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No. 495.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1920.

Patrick H. Bodkin,
Appellant,
vs.
William B. Edwards,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE NINTH CIRCUIT.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

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MOTION TO DISMISS OR AFFIRM.

In the matter of the appeal filed herein, the appellee moves that the same be dismissed because:

(1) The court has no jurisdiction, no federal question being involved in the right claimed by the appellant.

Or, if ground for jurisdiction appears, the appellee moves that the judgment and decree of the United States District Court, for the Southern District and Division of California,

as affirmed by the Circuit Court of Appeals for the Ninth Circuit, be affirmed because:

(1) No specific error assigned in the appeal raises any question necessary to its determination.

(2) The question attempted to be raised by the assignment of error is purely hypothetical, based upon the supposititious right appellant *might* claim under conditions other than that disclosed by the record.

(3) The decision of every question necessary to the determination of this appeal, or attempted to be raised by the assignment of errors, is absolutely foreclosed by the prior decisions of this court.

(4) It is manifest that the appeal is entirely without merit, and is taken only for delay.

Respectfully submitted,

SAMUEL HERRICK,

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Attorneys for Appellee.

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Appellee.

Brief in Support of Motion to Dismiss or Affirm.

STATEMENT OF THE CASE.

This suit, filed by the appellee in the United States District Court for the Southern District and Division of California in September, 1916, sought to have the appellant, to whom a series of patents for a certain tract of land had been issued by the Land Department of the Government, declared a trustee holding the title to such land for the benefit of the appellee herein. The bill of complaint was first dismissed by the

District Court without leave to amend, and this judgment was reversed by the Circuit Court of Appeals for the Ninth Circuit in March, 1918 (249 Fed. 562). On trial by the District Court, pursuant to the mandate of the Court of Appeals, the court found all the material facts set forth in the bill of complaint were true, and entered its decree according to the prayer of the complaint, April 18, 1919. From this decree the appellant appealed in turn to the Court of Appeals, and that court, in the second appeal, having affirmed the decree of the District Court on the ground that no new question was raised in such appeal, the appellant brought the present appeal to this court.

The object of this motion is to prevent a denial of justice by the long delay which an absolutely meritless appeal would entail if its lack of merit should not be called to the attention of the court.

The only facts which need be stated for the purpose of this motion are: On December 1, 1902, the appellee made homestead entry of the land in controversy, and pursuant thereto established his residence on the land and began its improvement. September 12, 1903, the land entered was included within a complete withdrawal, and while subject to that withdrawal the Land Department, on the authority of a regulation made by it June 5, 1905, permitted the appellant

here to contest the entry of the appellee on the ground of abandonment. April 23rd, 1909, the appellee completed the requirements of the land laws under his entry, and made final proof thereof before the land office, which proof the Land Department, not disputing its sufficiency, at all times refused to consider, solely because of the contest appellant was permitted to initiate during the withdrawal as stated.

The withdrawal was vacated May 18, 1910, and on June 1st, 1912, the Land Department accepted a homestead entry of the appellant in recognition of his supposed preferred right, after canceling the entry of appellee regardless of his final proof made as aforesaid, three years before.

The appellee continued to assert his right under his entry and final proof of completed requirements, and resisted the claim of appellant under his allowed entry for several reasons, the only reason that need be mentioned here being that appellant was disqualified to claim this land as a homestead because he was at the same time claiming other land by homestead. On May 27, 1913, the Land Department admitted the correctness of this contention, but, still refusing to consider the completed claim of the appellee, canceled appellant's claim to the *other* land claimed as homestead. Thereafter the appellant, representing to the Land Depart-

ment that the other land claimed was his real homestead, induced the department, on March 9, 1914, to permit him to place his homestead claim on such other land instead, tendering with his relinquishment of entry to the land to which appellee had completed claim five years before, three soldier's additional scrip applications.

At the time appellant made the said relinquishment, in order to continue to claim the other land claimed by him as his real homestead, or while his new scrip applications were pending before the department, the appellee had also pending before the department: (1) an application to contest the entry relinquished; (2) a motion to reinstate appellee's former entry and consider his final proof; (3) a petition for the exercise of the supervisory authority of the secretary of the interior in regard to the entire matter; and (4) a protest against the acceptance of the scrip applications of appellant, all of which were refused consideration by the Land Department.

The errors assigned in this appeal are:

"1. The court erred in holding that the Land Department erred in matter of law in finding and deciding that the appellee had abandoned his homestead entry.

2. The court erred in holding that appellant had not acquired a preference right of entry under the act of May 14, 1880, by virtue of the

final judgment rendered by the Land Department in and on appellant's contest against appellee's homestead entry.

3. The court erred in holding that the regulations of the Department of the Interior of January 19, 1909 (37 Land Decisions 365) terminated any and all right appellant had acquired by and under his contest against appellee's homestead entry.

4. The court erred in holding that the appellee was entitled to his homestead entry and the lands covered thereby, for equitable reasons, despite and notwithstanding the contest initiated against said entry by the appellant and the findings of fact and conclusions of law set out in the decisions and judgments of the Land Department under such contest.

5. The court erred in assuming, contrary to the explicit showing the record before it presented, that appellant exercised the preference right of entry awarded to him through the decisions of the Land Department by locating assignable soldiers' additional homestead rights upon the lands involved in the litigation, the record showing that appellant exercised such preference right by making a homestead entry of the land on June 1, 1912.

6. The court erred in failing to perceive among the admitted facts in the litigation the fact that, in enjoyment of his preference right of entry, the appellant filed his homestead application May 18, 1910; that such application was finally accepted and entry thereunder allowed on June 1, 1912, and that it was not until March 6, 1914, that the appellant located the assignable soldiers' additional homestead rights on the land, doing so contemporaneously with the relinquishment of his homestead entry.

7. The court erred in affirming the decree of the court below granting the prayers of the appellee's bill.

8. The decree is contrary to law."

It is seen that, insofar as these assignments are specific and intelligible, they are based entirely on the assumption that the appellant acquired by his contest, notwithstanding the withdrawal, a preferred right to the land, and that this right in some way survived after use, and after relinquishment of the entry allowed in its recognition, and that it barred consideration of any right of the appellee. Both these assumptions are absolutely barred by the prior decisions of this court.

This court decided that:

> "Vested rights can not be acquired to land reserved from sale."
>
> Morton v. Nebraska, 21 Wall. 660;
>
> Smelting Co. v. Kemp, 104 U. S. 636;
>
> Campbell v. Wade, 132 U. S. 37.

And regarding a right under a new entry after a relinquishment (here referring to a *third* party) the court has decided:

> "If there had been no contest, and the land records are free from any other claim than that which is relinquished, the second entryman may perfect title. But if the records of the land office show that there had been a contest, and the successful contestant makes a relinquishment, a third

> party entering the land is charged with notice of the equitable rights of the unsuccessful contestant; and if, as a matter of law, those rights are entitled to protection, they can be enforced whenever the legal title has passed from the government."
>
> McClung v. Penny, 189 U. S. 143-147.

But in this case not only was appellant "charged with notice" of the equitable rights of the appellee when tendering the scrip applications, but by his assignments of error he bases his claim in this litigation entirely on the fact that *he* was the "successful contestant" of the record claims, for the consideration of which there were pending and urged before the department at the time appellant relinquished his allowed claim, several separate and appropriate proceedings for reinstatement and recognition.

However incomplete the claim of the appellee might have been at the time appellant claimed to initiate a right of entry, upon the relinquishment of that entry it was the duty of the Land Department to reconsider the formerly rejected claims of the appellee and reinstate his entry.

Sarah Renner, 2 L. D. 43;
Florey v. Moat, 4 L. D. 365;
Mills v. Burge, 4 L. D. 447;
Holmes v. Northern Pac. R. R. Co., 5 L. D. 333;
Conley v. Mills, 11 L. D. 251;
Osborne v. Knight, 22 L. D. 459;
Brooks v. McBride, 35 L. D. 442.

And this duty devolved whether the appellee himself moved for such action, or whether the secretary of the interior proceeded on his own motion.

Knight v. U. S. Land Assn., 22 L. D. 462, 142 U. S. 161.

But the claim of appellee was *not* incomplete at the time appellant relinquished his entry, and was in no way dependent upon such relinquishment to give it validity. The records of this case show that before the entry relinquished was allowed, before even the right to make it was, by vacation of the withdrawal, initiable, either under the law or the regulations here claimed to supersede the law, the claim of the appellee was completed and final proof made thereof, and it is one of the most firmly established principles of the land law as declared by this court, that the full equitable title passed to the appellee at that time, and that thereafter the Land Department, not disputing the sufficiency of such proof, was without authority to dispose of the land to another.

Lytle v. Arkansas, 9 Wall. 314;
Dermott v. Jones, 2 Wall. 1;
Stark v. Starrs, 6 Wall. 402;
Carroll v. Safford, 3 How. 441;
Lindsey v. Hawes, 2 Black. 554;
Hoofnagle v. Anderson, 7 Wheat. 212;

Witherspoon v. Duncan, 4 Wall. 210;
Shepley v. Cowan, 91 U. S. 330;
Barney v. Dolph, 97 U. S. 652;
United States v. Thompson, 98 U. S. 486;
Simmons v. Wagner, 101 U. S. 260;
Deffeback v. Hawke, 115 U. S. 302;
Van Brocklin v. Tennessee, 117 U. S. 151;
Cornelius v. Kessel, 128 U. S. 456;
Buxton v. Traver, 130 U. S. 232;
Redfield v. Fisher, 132 U. S. 239;
Hastings v. Whitney, 132 U. S. 362;
Harden v. Jordan, 140 U. S. 371;
Benson Min. Co. v. Alta Min. Co., 145 U. S. 432;
Dibble v. Bellingham Co., 163 U. S. 63;
Doran v. Kennedy, 237 U. S. 362.

From the foregoing it is seen that, before the right claimed for appellant could be considered, this most firmly established principle of this court would have to be ignored, and, conceding every error assigned to the Honorable Circuit Court of Appeals to be error, the only possible result of the adjudication would be to find that the right claimed for appellant was still invalid for one of the reasons set forth, if not for the other reasons which were specified and determined by the Court of Appeals, or, to

decide what hypothetical right appellant *might* now have, *if* he had *not* relinquished the entry erroneously allowed him to the land to which the appellee had completed claim, but had relinquished his claim to the other land, which he still claims, instead.

It is respectfully submitted that appellant should not be permitted to delay justice and occupy the attention of the court by asking it to deliberate upon so frivolous a question. It is also submitted that, as appellant has no claim of right that is based upon any law of the United States, the court should refuse to entertain jurisdiction, or, if jurisdiction is entertained, the judgment and decree of the lower courts should be affirmed on notice of the record facts herein set forth.

Respectfully submitted,

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